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IN THE

Supreme Court of the United States

October Term, 1966.

No. 1148.

HULBURT OIL AND GREASE COMPANY,
an Illinois Corporation,
Petitioner,

v.

HULBURT OIL AND GREASE COMPANY,
a Pennsylvania Corporation,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1148

HULBURT OIL AND GREASE COMPANY,
AN ILLINOIS CORPORATION,

Petitioner,

v.

HULBURT OIL AND GREASE COMPANY,
A PENNSYLVANIA CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION.

QUESTION PRESENTED FOR REVIEW.

The issues as framed by Petitioner assume that the present suit would not be entertained in the Courts of Illinois; that the maintenance of this action is contrary to the public policy of the State of Illinois and in direct contravention to its statutory edict. The assumption itself glibly resolves the true question presented. That question is:

Does the bar of Section 157.125 of the Illinois Business Corporation Act apply to prevent a foreign non-qualified corporation from maintaining an action in equity to recover its corporate name and good will, wrongfully appropriated by a domestic Illinois corporation recently organized by the foreign corporation's former officer, director, shareholder and general manager, for the express purposes of making it impossible for such foreign corporation to so qualify and of appropriating the foreign corporation's business, name and goodwill in the State of Illinois?

STATEMENT OF THE CASE.

In its Statement, Petitioner omits the facts upon which the District Court and the Court of Appeals based their decisions. This case does not involve the simple legal question of whether a corporation barred from the Illinois Courts under the Business Corporation Act will nevertheless be permitted to maintain an action for unfair competition in the Federal Courts sitting in Illinois against a domestic Illinois corporation with an identical name. The question is whether under the peculiar facts and circumstances presented, Petitioner will be permitted to avail itself of the benefits of the statute. Thus the relationships between the parties and the purposes for which Petitioner was formed are the heart of the issue. These facts are summarized below.

Plaintiff is a corporation organized in the Commonwealth of Pennsylvania in 1910 with the purpose of "the manufacture and sale of lubricating and other oils, and lubrication devices and materials" (Finding of Fact No. 5; P. 20)[1] and succeeding to the business theretofore conducted by the Hulburt family from approximately 1861 (P. 20). From 1910 to 1918 it transacted business under the name "C. Hulburt & Co." (P. 20) and has been transacting business under the corporate name of "Hulburt Oil and Grease Company" continuously from 1918 to the present time (Finding of Fact No. 3; P. 20). Plaintiff's principal office is in Philadelphia, Pennsylvania (Finding of Fact No. 1; D. 1, 11; P. 21) and it maintains an office and owns and operates a plant in Benton, Illinois, which facilities were acquired by plaintiff on December 31, 1963 (Finding of Fact No. 6; P. 21).

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1. In this brief we shall refer to defendant's appendix as "(D. ...)," and to plaintiff's appendix as "(P. ...)." Where "Findings of Fact" are referred to, followed by an Appendix page reference, the latter refers to evidence upon which such "Finding" was based in whole or in part.

Over the years, plaintiff has expended substantial sums promoting its corporate and trade name in Illinois and has transacted substantial business with persons situate in the State of Illinois (Finding of Fact No. 7; P. 21). The name "Hulburt" and the corporate title "Hulburt Oil and Grease Company" are well known in the State of Illinois and have considerable value (Finding of Fact No. 8; P. 46-47).

On May 4, 1964, John R. Michael caused the name "Hulburt Oil and Grease Company" to be reserved in the State of Illinois and several other states (Finding of Fact No. 10; P. 32, 49). Mr. Michael, a substantial stockholder in plaintiff, had been employed by plaintiff, since 1920. Holding a variety of corporate titles and serving as General Manager, he effectively ran the company until March 31, 1964 (Finding of Fact No. 14; P. 21-22; 30). On April 9, 1964, plaintiff entered into an agreement with John R. Michael and his sons, David H. Michael and J. Graham Michael to purchase all of its stock owned by them for over $149,000.00 (D. 27). This sale was consummated on May 7, 1964, at which time John R. Michael's association with and employment by plaintiff completely terminated (D. 31). On May 4, 1964 when he reserved plaintiff's corporate name in Illinois, he was in plaintiff's employ pursuant to a contract dated January 1, 1962 (Finding of Fact No. 11; D. 41).

On May 21, 1964, John R. Michael caused defendant, an Illinois Corporation with its principal office in Chicago (Finding of Fact No. 2) to be organized under the name "Hulburt Oil and Grease Company" (Finding of Fact No. 12; P. 43-47). The organization of defendant was accomplished without the knowledge or consent of plaintiff under a veil of secrecy maintained by John R. Michael (Finding of Fact No. 20; P. 18-19, 44-45). It was accomplished two weeks after John R. Michael and his sons had sold their stock in plaintiff to plaintiff for $149,581.00 and had terminated their relationships with plaintiff (Finding of Fact No. 13; D. 31, P. 52).

John R. Michael knew that plaintiff was required to be licensed to do business in Illinois and was the person in plaintiff's organization with the duty of protecting plaintiff's business and good will including its name (Finding of Fact No. 22; P. 10-11, 23-28, 39-40). On several occasions while in plaintiff's employ he had been advised of the necessity of qualification but failed to cause the corporation to take the necessary steps (Finding of Fact No. 15; P. 23-28). Despite that knowledge, John R. Michael organized defendant as a means of holding the name "Hulburt Oil and Grease Company" for himself thus depriving plaintiff of its right to become qualified or continue in the transaction of its business in Illinois and in order to take from plaintiff and acquire for himself the right to own, use and trade under the name "Hulburt Oil and Grease Company" in the State of Illinois (Findings of Fact Nos. 16, 18 and 24; P. 32-33, 46-47).

Upon learning that it was not registered to do business in the State of Illinois, plaintiff made proper application to the Secretary of State of Illinois and took all steps within its power to comply with § 157.125 of the Illinois Business Corporation Law. Its application was refused solely by reason of the existence of defendant (Findings of Fact Nos. 25, 32 and 33, P. 19-20). By incorporating in Illinois in plaintiff's name, defendant put itself in a position to secure the benefits of and cause injury to plaintiff's business and jeopardized plaintiff's title to its real estate and other property in Benton, Illinois (Findings of Fact Nos. 26 and 27; P. 32-33, 46-47). In addition, the use of plaintiff's exact corporate title by defendant would be likely to cause confusion in the trade as to the source of products and would be likely to lead the public to believe that the defendant is in some way connected with the plaintiff (Finding of Fact No. 28; P. 46).

The taking of plaintiff's corporate and trade name in Illinois by defendant was not unintentional, and was neither accidental nor under a color of right. Defendant and John

R. Michael, its sole shareholder and *alter ego*, were well aware that the Hulburt name belonged to the plaintiff and knew that they had no moral or legal right to it (Findings of Fact Nos. 29, 30 and 31; P. 33, 46-47). In spite of this, defendant was organized with the conscious, malicious and fraudulent purpose of appropriating plaintiff's name and good will in the State of Illinois, and of interfering with, damaging or destroying plaintiff's business in the State of Illinois without any justification or excuse (Findings of Fact Nos. 29, 31 and 35; P. 38-39, 46).

During the course of this litigation defendant conducted itself in a vexatious and oppressive fashion, and plaintiff necessarily incurred $33,562.91 in extraordinary legal expenses for counsel fees and costs of litigation (Findings of Fact Nos. 34, 36).

This action was commenced on August 3, 1964 and, after hearing, a Preliminary Injunction issued on September 9, 1964. Upon interlocutory appeal by defendant, the entry of the Preliminary Injunction was sustained by the Court of Appeals on June 3, 1965 (No. 14916) and a Petition for Writ of Certiorari was denied by the United States Supreme Court (No. 333, October Term, 1965). After full trial before Judge Perry on December 27-30, 1965, the injunction was made final and damages were awarded plaintiff measured by legal fees and expenses necessarily incurred in the litigation. A further appeal to the Court of Appeals followed which, after argument, resulted in the affirmance of the Judgment of the District Court. It is of that decision that review is now sought.

The decisions of the Courts below rest upon their determination that the Courts of Illinois would entertain this suit were the suit brought before them rather than before a Federal District Court sitting in Illinois. The Courts below did not disapprove of the law of Illinois and assert it to be "legally unsound", but interpreted and applied the law of Illinois in the manner in which the Courts of Illinois would apply it if met with the situation presented in this

case. At the conclusion of the trial in the District Court Judge Perry stated (P. 12): "It has made every attempt to conform to the Law of Illinois, and having made such attempt, I believe that the State Courts would entertain this suit, having taken every action to do so in being deprived by the act and actions of the defendant." This conclusion was formally established in the Findings and Conclusions of the District Court (Findings of Fact No. 32-33; Conclusions of Law No. 3 and 4) and in the Opinion of the Court of Appeals (pp. 27-31, Appendix A to Petition).

ARGUMENT.

I.

The Court of Appeals Has Not Decided an Important State Question in a Way in Conflict With Applicable State Law.

The Court of Appeals correctly applied the law of Illinois in determining that plaintiff is not barred from maintaining this action.[2] Although there is no Illinois decision squarely in point, the equitable principles enunciated and relied upon by the Illinois courts require that result. Moreover, courts in other states have been confronted with cases involving similar situations, and in concluding that the suits should be permitted to be maintained, have applied those same principles and equitable doctrines which are so firmly rooted in Illinois jurisprudence. Among them *Scalise, et al. v. National Utility Service, Inc.*, 120 Fed. 2d 938 (CCA 5, 1941) and *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64 (CCA 8, 1916) are squarely in point with the instant case.

In the *Scalise* case, the plaintiff below, National Utility Service (hereinafter "National") was a corporation organized and existing under the laws of the State of New York which had transacted business for some years in the State of Florida without qualifying as a foreign corporation. In connection with the transaction of such business it had entered into a contract with Scalise. Scalise allegedly breached the contract. Thereupon National instituted an action in the state courts of the State of Florida seeking recovery for breach of contract. It was met with a plea in abatement under the Florida statute that made

2. Plaintiff suggests that this issue may now be moot as it is in fact now properly registered to do business in the State of Illinois (P. 53) and may certainly now maintain this action. *Emcee Corporation v. George*, 293 Ill. App. 240, 12 N. E. 2d 333 (1937); *Bell v. Maryland*, 378 U. S. 226, 12 L. Ed. 2d 822, 84 S. Ct. 1814 (1964); *Mills v. Green*, 159 U. S. 651, 40 L. Ed. 293, 16 S. Ct. 132 (1895).

nonqualification of a foreign corporation a ground for abatement of an action brought by it in the courts of the state, a statute comparable to the Illinois statute here in question. The state court stayed the action to give National an opportunity to qualify as a foreign corporation in the State of Florida. When National undertook to do this, it found that Scalise, during the interim, had caused a Florida Corporation with an identical name to be organized and consequently, National could not qualify. It thereupon instituted its action in the Federal District Court seeking an injunction to restrain and enjoin Scalise from using its name and thereby precluding it from qualifying in the state. It was met with the defense, among others, that its loss of its right to qualify was the result of its wrongful action of having done business in Florida without first qualifying, just as the plaintiff in the case at bar is met with such a defense here. In addition to the injunctive relief sought, it also sought compensatory and punitive damages. The trial court granted the injunctive relief sought and, after a jury trial, an award was made of both compensatory and punitive damages. An appeal was then taken. The Fifth Circuit Court of Appeals affirmed the lower court in all respects. In so holding the Court commented, p. 940:

> "* * * It is the law too, not only in Florida but generally elsewhere that it is a wrongful act to organize a domestic corporation by the same name as that already known to be used in the state by a foreign corporation, *although the foreign corporation is not domesticated, but is doing business, in the state without a permit,* and an injunction will issue, not merely after the charter has been obtained to prevent the use of the name in unfair competition, but to restrain the procuring or issuing of the charter under the proposed name or if the charter has been issued, to restrain the use of the name. 13 Am. Jur., Sec. 135, page 273; *Peck Bros. & Co. v. Peck Bros. Co.,* 7th Cir., 113 F. 291

62 L. R. A. 81; *General Film Co. v. General Film Co.*, 8th Cir., 237 F. 64; *Children's Bootery v. Sutker*, 91 Fla. 60, 107 So. 345, 44 A. L. R. 698. The evidence showing that defendant applied for a corporate charter, not only with full knowledge that plaintiff was doing business in the state under the same name, but for the sole purpose of interfering with and preventing plaintiff from prosecuting its suit under that name against defendant in the state court, it is perfectly clear that the injunction restraining the use by defendant of plaintiff's corporate name was properly ordered." Id. p. 940. (Emphasis supplied.)

The *Scalise* opinion was premised in part upon *The Peck Bros. & Co. v. Peck Bros Co.*, 113 Fed. 291 (7th Cir. 1902). The *Peck* case similarly involved the question whether a corporation lately formed under the laws of Illinois was immune to action by a corporation of the same chartered in Connecticut some years before. The trial court dismissed the plaintiff's action for want of equity. However, the Court of Appeals reversed and remanded with directions to enter a decree for the complaining corporation. It clearly appeared that the organizers of the junior corporation had been engaged in a scheme to appropriate the name of the original corporation with which the organizers of the Illinois corporation had been connected. The observations of this Court in granting injunctive relief for the complaining corporation are, at least in part, persuasive in resolving the issues here. With respect to the protection of the senior corporation's name, this Court said, p. 298:

"It is now so well settled, both by the decisions of the Supreme Court and of this court, that the wrongful use of one's own name to the injury of another, which results in the palming off upon the public his goods as the goods of that other, will be restrained, that it is not needful to review the authorities.

> * * * The name, manifestly, was thus assumed for the purpose of obtaining the good will of the established business of the Connecticut corporation, resulting, failing the acquirement by purchase of the business, good will, and trade-name, in fraud upon the public, and injury to the legitimate proprietors of the business and trade-name."

The Court, in its opinion, also expressed the sound view that mere incorporation under the laws of Illinois does not "magically" protect one from the consequences of his own wrong. In answer to the argument that the sovereignty of the State of Illinois had conferred the name upon the Illinois corporation and therefore was protection for such later corporation (which is also asserted by the defendant in its Petition, pp. 7-10), the Court said, p. 300:

> "* * * There is, however, in the term 'sovereignty', no magic to conjure by. It can confer upon individuals no right to perpetrate wrong. Nor do we think that the sovereignty of the State of Illinois sought to do that. * * * The act of sovereignty allowing incorporation is permissive, not mandatory. It sanctions the act of incorporation under the name and for the business proposed, if that name and that business be otherwise lawful. The sovereign by the act of incorporation adjudges neither the legality of the business proposed, nor of the name assumed. That is matter for judicial determination by a court having jurisdiction of the subject when the legality of the business or of the name is called in question. If one may not use the name imposed upon him in invitum so that it shall work wrong to another, by what token may he become incorporated under a name selected by himself to effect like wrong? And how is the sovereignty of a great state impugned by the denial to incorporators of a right to perpetrate such wrong? Is it possible that a sovereignty of a state can be thus invoked to

perpetrate a fraud? If it may be, then indeed will that sovereignty stand for oppression, and not for justice. Then could one who, in connection with a business to which his name had been attached and had given value to it, having disposed of the right to use that name to another, and so by the law prohibited from using it in connection with a like business under circumstances that would work a fraud, be enabled to effect the fraud by simply becoming incorporated under that name under the sovereignty of the state of Illinois. We cannot bend our judgment to the conclusion that a sovereign state designed thus to confer immunity for wrong. * * *"

The views thus expressed in the *Peck* case are based upon the same general equitable principles and doctrines as the *Scalise* decision and have equal application in the case at bar.

In the *General Film* case, 237 Fed. 64 (8th Cir. 1916), the plaintiff, a corporation of the State of Maine, was transacting business in the State of Missouri without having qualified to do so and in violation of the statute of that state. The incorporators of the defendant, the Missouri corporation, learned of this and thereupon incorporated the Missouri corporation for the same purposes and brought suit to enjoin the Maine corporation from transacting business in the state. The Maine corporation counterclaimed, seeking an injunction against the use of its name by the Missouri corporation. The Missouri corporation asserted the nonqualification of the Maine corporation as a defense although the Maine corporation was being prevented from complying with the qualification law solely by reason of the incorporation of the Missouri corporation under an identical name. In holding this defense to be without merit, the Court stated in part, p. 66:

"* * * A corporation chooses it own name. It does it with a view to the business in which it is presently

to engage. It is therefore charged with the duty of not selecting a name for fraudulent purposes. It is the duty of courts of equity to enforce the observance of this rule. Plaintiff, however, says that it got its name from the state, and may therefore use it, and the defendant cannot now use its name in the state because the Secretary of State will not grant it a license on account of the similarity of its name to the name of the plaintiff. *The complete answer to that contention is that plaintiff selected its name to accomplish a fraudulent purpose. A court of equity cannot be stayed in its duty to protect property rights by means of such a subterfuge as the plaintiff has practiced.* The organization of corporations under modern law is a simple performance. It is controlled wholly by the men who seek that form of business organization. This being the case, the act of taking out a corporate charter, although it invokes the authority of the state, cannot be made use of for purposes of fraud. If it is made use of for that purpose, the fact that the charter was obtained from the state cannot deprive a court of equity of its power to prevent fraud and protect property rights. The most solemn decrees of courts will be set aside when they are procured by fraud. Much more will the voluntary acts of individuals in forming a corporation. * * *" (Emphasis supplied.)

In accord see also, *Red Seal Refining Co., et al. v. Red Seal Refining Corp.*, 241 P. 762 (Okla., 1925) and *Western Auto Supply Co. v. Western Auto Supply Co.*, 13 F. Supp. 525 (D. C. N. H., 1936).

In the *Western Auto Supply Company* case, the court in granting the relief sought stated in part:

"A foreign corporation can restrain the use by a domestic corporation of a trade name similar to its own when such name is chosen by the domestic corporation with the notice of the name and business of the foreign

corporation even though the latter has obtained no authorization to do business in the state. This principle of law is based upon the prevention of fraud * * *" *Id.* p. 528.

U. S. Light and Heating Company of Maine v. U. S. Light and Heating Co. of New York, 181 Fed. 182 (D. C. S. D. N. Y., 1910), another decision of similar import, is noteworthy because it contains the discerning views of the Honorable Learned Hand. There the statute involved was determined to apply to contract actions alone; however, the facts as observed by Judge Hand are so close to the undisputed circumstances of the case here, that a quotation of a portion of his opinion is most helpful in shaping a judicial sense of direction, particularly where Judge Hand said, p. 183:

> "Upon the merits I have no doubt that Moore's effort was either to embarrass the New Jersey Company by preventing it from getting a New York license, or to set up a business which should divert or disarrange the complainant's business. The case is quite devoid of the usual excuses and defenses, and seems to me to be a more impudent effort by a retiring or discharged employe to seize part of the business, than I have ever before met with. An especially flagrant fact is that Moore organized the company—which is the most obvious cover for himself alone—while he was yet in the employ of the New Jersey company. * * *"

By substituting the name "Michael" in place of "Moore" Judge Hand's observations might well have been a description of the situation presented in the case here. Of course, Judge Hand enjoined the defendant company from using the plaintiff's corporate title.

These decisions are well reasoned, persuasive, and adhere to the same basic equitable principles followed by the Illinois Courts. As found by the District Court, plaintiff

has been injured by defendant's recent incorporation in Illinois, utilizing plaintiff's exact corporate title. If, as defendant argues, plaintiff is barred by Section 157.125 of the Illinois Business Corporation Act from maintaining this action, then plaintiff is totally without remedy.

The Court of Appeals below properly ruled that the Act did not bar plaintiff from maintaining this action for equitable relief, and in so doing, properly followed the long settled law and fundamental principles of equity as applied in *Scalise, et al. v. National Utility Services Inc.*, 120 Fed. 2d 938 (5th Cir. 1941) and *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64 (8th Cir. 1916) and as expressed in many Illinois decisions.

It is a basic tenet of equity that:

> "* * * one who prevents the performance of a condition, or makes it impossible by his own act, will not be permitted to take advantage of the non-performance. * * *" 3 Story's Equity Jurisprudence, 14th Ed., § 1741, p. 360.

This case is one where the jurisdiction of an equity court is peculiarly pertinent. The injunctive relief sought is the appropriate remedy and is of purely equitable cognizance. As the author of Pomeroy's Equity Jurisprudence points out as to cases involving fraud:

> "In conferring these reliefs which are purely equitable, and therefore exclusive, the power of equity knows no limit. The court can always shape its remedy so as to meet the demands of justice in every case, however peculiar." 3 Pomeroy's Equity Jurisprudence, 5th Ed., § 910, p. 574.

See also; *Nikola v. Campus Towers, etc.*, 303 Ill. App. 516, 525, 25 N. E. 2d 582; *Backs v. Nelson Const. Co.*, 271 Ill. App. 137; *Skelly Oil Co. v. Universal Oil Products Co.*, 338 Ill. App. 79, 84, 86 N. E. 2d 875, 881 (1949).

The defense of non-compliance with § 125 of the Illinois Corporation Code is not jurisdictional. It merely affords abatement of an action pending compliance. This was determined in *Emcee Corporation v. George,* 293 Ill. App. 240, 12 N. E. 2d 333 (1937) shortly after the passage of the present Corporation Code.[3] In that case judgment had been granted plaintiff when defendant petitioned to vacate the judgment and dismiss the action for failure of the plaintiff to have qualified as a foreign corporation under § 125 of the Corporation Code, the court refused, saying (12 N. E. 2d, p. 335):

> "Under this section, if we assume that plaintiff, a foreign corporation, was transacting business within this state without having obtained a certificate of authority from this state, contrary to the provisions of the statute, we think the suit ought not to be dismissed because if it should thereafter obtain such certificate it could then proceed with the suit."

See also *Jorgenson v. Baker,* 21 Ill. App. 2d 196, 157 N. E. 2d 773 (1959), cert. den. 361 U. S. 962, 4 L. Ed. 2d 543, 80 S. Ct. 590 (1960) and *Sternberg Dredging Co. v. Sternberg's Estate,* 351 Ill. App. 514, 115 N. E. 2d 557 (1953) indicating that the bar imposed upon a corporation which has failed to pay its franchise taxes is not absolute but

3. The case relied upon by defendant for the contrary position (Def. Brief pp. 16-17) was decided under the provisions of prior and quite different Corporation act. *J. Walter Thompson Co. v. Whitehead,* 185 Ill. 454, 56 N. E. 1106 (1900) dealt with the Act of 1897 which provided that ". . . no foreign corporation . . . which shall fail to comply with this act, can maintain any suit or action, either legal or equitable, in any of the courts of this State upon any demand, whether arising out of contract or tort." The 1897 Act contained no provision permitting maintenance of an action when "such corporation shall have obtained a certificate of authority" as is provided by present law. It contained no provision comparable to that in the 1937 Act saving the validity of contracts and acts of unregistered corporations or authorizing the defense of actions. Clearly decisions on the effect of this earlier Act are not authority for the determination of the application of § 125 of the Business Corporation Code of 1937.

merely precludes maintenance until the defect is cured, when it may then continue the prosecution of the suit.

Being personal and not jurisdictional, the defense may be waived if not asserted and is quite similar to a plea of a statute of frauds where the applicable rule is:

> "It is a most important principle, thoroughly established in equity, and applying in every transaction where the statute is invoked, that the statute of frauds, having been enacted for the purpose of preventing fraud, shall not be made the instrument of shielding, protecting, or aiding the party who relies upon it in the perpetration of a fraud, or in the consummation of a fraudulent scheme." 3 *Pomeroy's Equity Jurisprudence,* 5th Ed., § 921, pp. 618-619.

The ability to assert the bar of the Illinois statute arises, in this case, as a consequence of the wrongful and fraudulent acts of the defendant and John R. Michael. Consequently, this is a proper case for the application of the doctrine of equitable estoppel to prevent the assertion of the defense and the consummation of defendant's fraud. It is stated authoritatively in 19 *American Jurisprudence,* Estoppel, Section 41, page 640, as follows:

> "Generally speaking, however, equitable estoppel is a rule of justice which in its proper field prevails over all other rules. It is a rule of last resort, but when it is aroused into activity, it stays the operation of other rules which have not run their course, when to allow them to proceed further would be a greater wrong than to enjoin them permanently. It may, in proper cases, operate to cut off a right or privilege conferred by statute or even by the Constitution. Since, as has already been stated, estoppel in pais operates as a shield and not as a sword, the estoppel should not be given effect beyond the extent of the injury or beyond what is necessary to accomplish justice between the parties, but should be limited to

saving or making whole the person in whose favor it arises or, in other words, to what may be necessary to put the parties in the same relative position which they would have occupied if the predicate of the estoppel had never existed. In some cases it is given effect only to the extent of cutting off resort to a particular remedy without affecting the ultimate right."

It is elsewhere in this work stated (Id. Estoppel Section 34, page 634):

> "Equitable estoppel or estoppel in pais is a term applied to a situation where, because of something which he has done or omitted to do, a party is denied the right to plead or prove an otherwise important fact * * *."
>
> "The proper function of equitable estoppel is the prevention of fraud, actual or constructive, and the doctrine should always be so applied as to promote the ends of justice and accomplish that which ought to be done between man and man." Id. Section 39, page 637.

The decisions of the Illinois courts have shown consistent adherence to these basic equitable doctrines.[4] *Lincoln Park Arms Building Corporation v. U. S. Fidelity & Guaranty Co.*, 287 Ill. App. 520, 531, 5 N. E. 2d 773 (1936); *Laughlin v. Irwin*, 262 Ill. App. 40, 54 (1931); *Jennings v. Bituminous Casualty Corp.*, 47 Ill. App. 2d 243, 249, 197 N. E. 2d 513, 517 (1964); and *Malloy v. City of Chicago*, 369 Ill. 97, 104, 15 N. E. 2d 861 (1938).

The philosophy underlying these established equitable principles finds its root in the Constitution of the State of

4. Defendant argues that it may not be estopped to assert the bar of the Illinois Act because to do so would contravene the public policy of Illinois. That argument is not applicable. The purpose of § 125 of the Illinois Corporation Code is to encourage the qualification of foreign corporations; the very purpose for which this suit was commenced. The closing of the doors of the courts to unregistered corporations is not the end sought by the Act, it is only a means to force compliance.

Illinois, Article II, Section 19 which requires that every person who has suffered a wrong be afforded a remedy. In compliance courts of Illinois have often repeated that where the law does not supply a specific remedy a court of equity has the power to do so.

In *Skelly Oil Company v. Universal Oil Products Co.*, 338 Ill. App. 79, 86 N. E. 2d 875 (1949) the court in discussing the above cited Illinois Constitution mandate said, p. 84:

> "This is a clear mandate to the courts, that wherever the legislature has failed to provide a remedy, the courts must. This constitutional protection should be here invoked, especially where the legislature has not provided a remedy. Courts should not be helpless to find a remedy for a fraud of the instant type. If the statute fails to provide a remedy, the court can, as it has in many instances under the common law and equitable principles. * * *"

The court below properly concluded that defendant, the *alter ego* of John R. Michael, is guilty of intentionally wrongful conduct and is attempting to insulate itself from responsibility for its wrongful conduct by setting up plaintiff's failure to qualify in Illinois, when as a matter of proven fact, John R. Michael, the creator, organizer and sole stockholder of defendant, was, himself, the very person responsible for the failure of plaintiff to secure proper qualification. That such conduct is wrongful and justifies unhesitating equitable relief is amply clear from authorities. *Scalise v. National Utility Service, Inc.*, 120 Fed. 2d 938, 940 (5th Cir., 1941); *The Peck Bros. Co. v. Peck Bros.*, 113 Fed. 291, 298-303 (7th Cir., 1902); *General Film Co. of Missouri v. General Film Co. of Maine*, 237 Fed. 64, 66, 67 (8th Cir., 1916).

The District Court in the instant case properly exercised its own sound judgment as to the determination that the courts of Illinois would make of this issue. *Daily v. Parker*, 152 F. 2d 174 (7th Cir. 1945). Since that de-

cision is in accord with the general weight of authority throughout the United States and is properly founded and based upon the general law of Illinois and the fundamental principles of equity recognized by the Illinois courts, it was properly sustained. *Wisconsin Screw Co. v. Fireman's Fund Insurance Company,* 297 F. 2d 697 (7th Cir. 1962).

II.

The Decision of the Court of Appeals Does Not Involve the Determination of Any Federal Question.

Petitioner suggests that the Court of Appeals failed to decide an important federal question in accord with the decision of this Court in *Woods v. Interstate Realty Co.,* 337 U. S. 535, 93 L. Ed. 1524, 69 Sup. Ct. 1235 (1949). However, as clearly appears from its opinion, the Court of Appeals determined that under Illinois law the Illinois courts would entertain this action and that, therefore, the issue of *Woods* was not presented. Illinois law was applied and followed throughout. No federal issues have been determined and there are no special or important reasons for this Court to exercise its discretion to review.

The instant case does not involve any unique principle or matter of public importance, and therefore should not concern this Court. It is simply a case where defendant's cynical attempt to create a shield from his own wrongdoing was given the short shrift it deserved.

CONCLUSION.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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